U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

BS

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 28 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the Form ETA 750A, Application for Alien Employment Certification, filed with the Department of Labor, which certified the application, the petitioner is a "translation and counselor in French law" firm. According to the Form I-140 petition, the petitioner is a "counselor in French Law – French Language Courses" business.

The petitioner seeks to employ the beneficiary permanently in the United States as a paralegal and legal assistant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

For the reasons discussed below, we uphold that determination. In addition, however, we find other bases of denial. First, as will be discussed in greater detail below, the petitioner appears to have misrepresented material information on the Form ETA-750A. The petitioner also appears to have omitted material information that, if revealed, might have caused the Department of Labor to question whether the job offer was open to qualified U.S. workers.

Finally, as will also be discussed below, while the beneficiary may be an advanced degree professional, the Form ETA-750A does not indicate that the job requires an advanced degree as defined in the regulations.

Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 22, 2001. The proffered wage as stated on the Form ETA 750 is $23 per hour, which amounts to $41,860 annually based on 35 hours per week. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on December 21, 2000, to have a gross annual income of $6,307, net annual income of -$337 and to currently employ zero workers. In support of the petition and in response to the director's request for additional evidence, the petitioner has submitted

documentation regarding the petitioner on compact disc, its 2001 and 2002 tax returns, the personal tax returns of the petitioner's president filed jointly with his wife, the beneficiary, and personal and corporate bank statements. On appeal, the petitioner submits its 2003 corporate tax return.

The tax returns reflect the following information for the following years:

	2001	2002	2003
Gross income	$6,307	$4,631	$15,758
Net income	($337)	($8,653)	$6,582
Current Assets	$65,734	$63,453	$209,225
Current Liabilities	$0	$0	$0
Net current assets	$65,734	$63,453	$209,225
Loans from Shareholders	$62,863	$67,027	$203,952
Common Stock	$10,000	$10,000	$10,000
Other Liabilities	$5,000	$5,000	$5,000
(from a trust in the name of the beneficiary's daughter)			

In a May 28, 2003 letter, the petitioner's president explains that the business has yet to earn trade income because the beneficiary is not yet authorized to work.

In addition, the petitioner submitted an August 2002 statement for a corporate Money Market account, number 2000010589289, with a balance of $61,307.36 and an August 2002 statement for a corporate checking account, number 2000009481796, with a balance of $2,089.00. In addition, the petitioner submitted statements for accounts owned by the petitioner's president and the beneficiary. The petitioner also submitted the personal tax returns filed jointly by the petitioner's president and the beneficiary. These returns reflect that most of their income is derived from a foreign pension. The petitioner also submitted a trust set up by the petitioner's president and the beneficiary in favor of their daughter. The petitioner further submitted its October 7, 2002 insurance policy with a $300,000 limit. Finally, the petitioner submitted a May 21, 2003 deposit document confirming a May 20, 2003 deposit of $52,000 into account 2000010589289, increasing the balance in that money market account to $152,523.78.

The director declined to consider the assets of the petitioner's president and his wife, the beneficiary, as a corporation is a separate legal entity. The director noted the petitioner's net losses in 2001 and 2002 and that the $52,000 deposit occurred after the priority date and determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner asserts that the director failed to consider the full balance in the money market account as of May 21, 2003.

The petitioner submits a 2003 personal guarantee from its president, the beneficiary's husband, to pay the beneficiary's salary and evidence of additional deposits into the corporate money market account. In a subsequent submission, the petitioner's president asserts that the petitioner was "specially created" for the beneficiary.

The petitioner's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a

petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Finally, the largest sums are demonstrated in 2003 and do not relate to the petitioner's ability to pay the proffered wage as of the priority date in 2001.

The petitioner's reliance on the assets of the president (the beneficiary's husband) is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). We will not consider the financial resources of individuals who, in 2001, had no legal obligation to pay the wage.[1] *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Moreover, given that most of the president's assets are jointly owned with the beneficiary, the petitioner is essentially asking that we consider the beneficiary's ability to pay her own wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. In 2001 and 2002, the petitioner showed a net loss and its net income in 2003 is far less than the proffered wage.

We acknowledge that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any

[1] The petitioner's president executed his personal guaranty in 2003.

argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d).

Typically, if a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. We acknowledge that in 2001, 2002 and 2003, the company's net current assets were sufficient to cover the proffered wage. This petition, however, is not a typical case. For example, the petitioner's past performance is a factor in considering its ability to pay the proffered wage. *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). In this matter, the petitioner has yet to operate the type of business it claims it will operate. There is no evidence that disinterested parties have evaluated the potential for this company to succeed and, based on a positive review of its potential, invested venture capital. Rather, the beneficiary and her husband are the sole owners of the petitioner and appear to be the only ones who have contributed capital and made loans to the company. The schedules L clearly reflect that the bulk of the cash available as current assets comes from the shareholder loans. Thus, the beneficiary and her spouse have essentially lent the company, which has yet to perform the type of business claimed on the application for alien employment certification, the money they allege will cover the proffered wage. Thus, it is impossible for us to evaluate whether the business has the potential for generating sufficient income to cover the proffered wage. In this unique circumstance, we cannot conclude that the company's net current assets are an accurate reflection of its financial situation as an operational company. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

The petitioner has not demonstrated that it paid any wages to the beneficiary during any year. In 2001 and 2002, the petitioner shows a net loss and in 2003 a net income of only $6,582. In 2001 through 2003, the petitioner does show positive net current assets, but these net current assets do not accurately reflect the business' financial situation as an operational business for the reasons discussed above. The petitioner has not, therefore, shown the ability to pay the proffered wage as of the priority date and continuing.

Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and we uphold the director's conclusion to that effect.

Disclosures on ETA-750A

Beyond the decision of the director, the record contains evidence suggesting the petitioner did not provide complete and accurate information before CIS and the Department of Labor. First, on Part 4 of the instant petition, the petitioner indicated that no petition had been filed in behalf of the beneficiary prior to the instant

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[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petition. In fact, the beneficiary filed a previous petition in her own behalf, receipt number SRC-98-163-52235. As the president of the petitioning company who completed the Form I-140 under penalty of perjury is the beneficiary's husband, it can be expected that he was aware of the beneficiary's prior self-petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

In light of the reduced credibility of the petitioner's president, we will examine the record as to whether it supports his attestations before the Department of Labor. On the Form ETA-750A, the petitioner indicated that the beneficiary would work as a counselor in French law and left blank item number 16, which requests the occupational title of the person who will be the beneficiary's immediate supervisor. As discussed above, the beneficiary is the wife of the petitioner's president and, according to Note 2 of the petitioner's 2001 corporate tax return, the two of them each own 50 percent of the petitioner's voting shares.[3] According to *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the title of the alien's supervisor in cases where the beneficiary has an interest in the petitioning company is a material fact for consideration by the Department of Labor. Specifically, for the reasons discussed below, the beneficiary's ownership in the company and marital relationship with the company's president suggest that the job offer was never bona fide.

On appeal, the petitioner's president inquires what must be done to create the proposed business and invest in the United States and implies that the business was designed for employment of the beneficiary. We note that the instant petition is an employment-based visa petition filed by an allegedly existing employer.[4] The regulation at 20 C.F.R. § 656.3 provides the definition of employment as "permanent full-time work by an employee for an employer *other than oneself.* For purposes of this definition *an investor is not an employee.*" (Emphasis added.)

Under the regulations at 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a bona fide job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a bona fide offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment. As discussed above, the beneficiary is the wife of the petitioner's president, a shareholder and a

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[3] According to information filed with the State of Florida, available on its Department of State website, the beneficiary is a director/officer of the corporation. Her title is "VD" while her husband's title is "PD."

[4] A separate visa category set forth in section 203(b)(5) of the Act exists for investors and requires an investment of $500,000 at a minimum and the creation of 10 jobs. This petition does not seek benefits under that provision.

director. For the reasons discussed above, that information was material to the certification of the ETA-750A as these positions and relationships can be construed as evidence that the job offer is not bona fide.

Moreover, the record contains inconsistencies regarding the nature of the petitioner's business. As stated above, on the Form ETA-750A and the Form I-140 petition, the petitioner indicated that its business involved translation and French law counseling services. The petitioner also included French language services on the petition. According to the 2002 and 2003 corporate tax returns submitted, the petitioner's primary business activity is teaching. The product or service is identified as "Teach % Legal Advse." While legal advice is listed as a service, the business activity code is 611000, which relates to educational services. We note that code [redacted] relates to translating and interpreting services while code 541190 relates to "other legal services," the only two types of services the petitioner stated on its application for labor certification. The petitioner did not list either code on any of its corporate tax returns.

While the petitioner's website includes French legal and translating services, it also indicates that it offers French language classes and the sale of small double cross-stitched "rugs." The only telephone directory listing provided lists the petitioner as a provider of French language courses.

Matter of Ho, 19 I&N Dec. at 591-592 states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has not resolved the inconsistencies regarding the type of business it operates. Thus, we cannot determine whether the petitioner accurately represented the nature of its business to the Department of Labor and to CIS. Misrepresentation on the application for labor certification is grounds for revocation of the approval of that application. 20 C.F.R. § 656.30(d).

Requirement for Advanced Degree

Beyond the director's decision, the job offer does not qualify for the classification sought. On part 14 of the Form ETA-750A (as certified by the Department of Labor), the petitioner indicated that the job required "bachelor" degree, but the number of years of college required is only two. Further, the same section indicates that only two years of experience in "private practice" are required.

The final sentence of the regulation at 8 C.F.R. § 204.5(k)(4) states: "The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability." The regulation at 8 C.F.R. § 204.5(k)(2) states that a bachelor's degree plus five years of progressive experience is equivalent to an advanced degree. In this case, irrespective of the beneficiary's actual qualifications, the job offer portion of the individual labor certification does not require a professional holding an advanced degree or the equivalent as it only requires a two-year "bachelor" degree plus two years of experience. Thus, the petition cannot be approved for the classification sought. Nothing in the law or regulations requires us to consider the petition in a lesser classification than the one sought.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.